

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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SEP 22 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

)
Amendment of Parts 2, 73, 74 and 90 of the)
Commission's Rules to Permit)
New York Metropolitan Area)
Public Safety Agencies to Use)
Frequencies at 482-488 MHz)
)
)

ET Docket No. 03-158
MB Docket No. 03-159

COMMENTS OF K LICENSEE INC.

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COMMENTS OF K LICENSEE INC.

K Licensee Inc. ("KLI"), the licensee of WEBR(CA), Channel 17, Manhattan, New York, a Class A Low Power Television ("LPTV") station with facilities located at the Empire State Building, by counsel, hereby submits its comments pursuant to Section 1.415(a) of the Commission's rules, 47 C.F.R. § 1.415(a), in response to the Notice of Proposed Rule Making ("Notice") in the above-captioned proceeding. KLI faces this proceeding in a difficult posture, with a threat of substantial adjacent-channel interference from the entire New York public safety community. Throughout the Notice, references are made to the terrorist attacks of September 11, 2001, and the increasing importance of public safety radio systems.

Notwithstanding the legitimacy of Homeland Security concerns at this important time in history, there is no evidence that the proposals made by the New York Metropolitan Area Public Safety Agencies ("NYMAC") are driven or justified by an urgent need for additional mission-critical

frequencies to respond to terrorist acts.¹ Despite the Commission's apparent desire to give these public safety agencies whatever they seek expeditiously, the Commission must give due process to all affected parties, including KLI.

KLI's due process concerns are magnified by the fact that the Notice carries a tone of pre-judgment favoring the NYMAC request. The "tentative conclusions" in the Notice are not the product of objective inquiry, but they are the result of blind faith in NYMAC's biased, *ex parte* submission – the primary and sole source of information for a vast string of extensive and sweeping judgments, completely unsupported by detailed factual disclosures. In many places in the Notice, it appears that the Commission has been grossly misled by NYMAC. The Notice then seeks comment on its tentative conclusions based on such incorrect information. The result is a Notice that inappropriately shifts the burden of proof to the would-be victims of interference without their being in possession of the technical information necessary to respond. This places an enormous financial burden on KLI, a financially-distressed LPTV station operator, to defend its right to be free of inter-service interference from expanded future adjacent-channel operations by public safety agencies on Channel 16.

Most problematic for KLI are three basic issues: (1) the Notice presumes the accuracy of NYMAC's technical conclusions and fails to provide detailed technical information

¹ McKinsey & Company prepared a report dated August 19, 2002, based upon information supplied by the New York Police Department entitled "Improving NYPD Emergency Preparedness and Response" ("McKinsey Report"), a copy of which is attached hereto beneath Tab A. The report examined NYPD emergency response objectives and how well they were achieved on 9/11, including the public safety communications system. A field survey indicates that communications system failure was not a major problem. Indeed, fewer than 20% of the respondents disagreed with the statement "I was able to clearly hear and decipher radio traffic on 9/11." *Id.* at p. 70. Only 15% of the respondents believed they experienced a communications failure on 9/11. *Id.* at p. 69. Where failures occurred, there was no significant distinction reported among frequencies. *Id.* at 73. In sum, there is no evidence in the McKinsey Report to support the assertion that frequency unavailability was a significant problem for the public safety agencies responding to the terrorist attacks of September 11, 2002.

sufficient for KLI's consulting engineer to conduct a meaningful interference analysis;² (2) the Notice fails to examine the factual basis for the conclusion that the spectrum now assigned to public safety agencies in New York is insufficient; and (3) the Notice completely neglects the plain language requirements of Section 337 of the Communications Act, as amended, and the legislative history of Section 337.

Because the Notice in this proceeding does not provide sufficient technical information about the proposed use of Channel 16 by public safety agencies, and KLI has been refused such information directly (even on a confidential basis) by NYMAC's representatives, KLI cannot meaningfully participate in this rulemaking as required by the Administrative Procedure Act, 5 U.S.C. § 553(b).³ Therefore, KLI's comments respond to only some of the issues raised in the Notice.

I. Factual and Legal Background.

Channel 16 is an unassigned television channel in New York City; it is not allocated to analog or digital television use in New York City, and there is no use of the channel for television broadcasting in New York City.⁴ The use of Channel 16 in New York City for public safety land mobile communications licensees began with a *conditional* waiver of Parts 2 and 90 of the Commission's rules granted in March of 1995. The order granting that conditional waiver (the "Order"), attached hereto beneath Tab B, permitted the *temporary* assignment of

² The Notice completely omits any discussion of the responsibility previously placed by the FCC on public safety agencies operating on Channel 16 pursuant to a temporary conditional waiver to protect television operations from interference.

³ Due to financial hardship, counsel was not retained by KLI to prepare initial comments for this proceeding until September 17, 2003. Because of the closure of the FCC on September 18 and 19, 2003, due to Hurricane Isabel, a request for an extension of time to file comments and reply comments could not be filed until the date when comments were due.

⁴ 47 C.F.R. §§ 73.606 and 73.622.

frequencies in the 482-488 MHz band. The conditional waiver was granted only for a period of five years, or until the Commission assigns Channel 16 in New York City for advanced television service, and the channel is utilized by a television licensee.

The conditional waiver was based in part on the assertion by NYMAC that the use of Channel 16 frequencies was necessary because the agencies “must update, expand and modernize their radio communications systems . . . but there are no frequencies available in the New York City metropolitan area that can meet their immediate needs.” Paragraph 6 of the Order describes the many rationales advanced by NYMAC for granting the conditional waiver rather than requiring the NYMAC agencies to make more spectrum-efficient uses of their existing spectrum allocations in New York – the primary rationale being the associated costs, estimated at over \$275 million.

The conditional waiver was based on two critical assertions by NYMAC: (1) that “the requested frequencies can be used for public safety systems within the New York City metropolitan area without causing harmful interference to any full power broadcast television stations”; and (2) that they would coordinate with the LPTV station now known as WEBR(CA) “to ensure that their proposed operations would not cause harmful interference to the LPTV station operation.”

On August 5, 1997, Congress amended the Communications Act of 1934, 47 U.S.C. § 151 *et seq.* (the “Act”) to include Section 337.⁵ This section was subsequently amended in 1999.⁶ In enacting Section 337, Congress comprehensively considered the

⁵ P.L. 143-33, Title III, § 3004, 111 Stat. 266 (Aug. 7, 1997).

⁶ P.L. 106-79, Title VIII, § 8124(a), 113 Stat. 1262 (Oct. 25, 1999); and P.L. 106-113, Div. B, § 1000(a)(5), 113 Stat. 1536 (Nov. 29, 1999).

requirements for granting “unused frequencies” to public safety agencies. Congress was quite clear in describing these requirements in the statute, which requires the Commission to find that:

- (A) no other spectrum allocated to public safety services is immediately available to satisfy the requested public safety service use;
- (B) the requested use is technically feasible without causing harmful interference to other spectrum users entitled to protection from such interference under the Commission’s regulations;
- (C) the use of the unassigned frequency for the provision of public safety services is consistent with other allocations for the provision of such services in the geographic area for which the application is made;
- (D) the unassigned frequency was allocated for its present use not less than 2 years prior to the date on which the application is granted; and
- (E) granting such application is in the public interest.

47 U.S.C. § 337(c).

In addition to these requirements, Congress specified that licenses granted pursuant to such applications for waiver would be subject to certain conditions. Among other things, these requirements include conditions that: (1) shall establish interference limits at the boundaries of the spectrum block and service area; and (2) shall establish any additional technical restrictions necessary to protect full-service analog television service and digital television service during a transition to digital television service. 47 U.S.C. § 337(d).

In late 1999, KLI acquired an LPTV station, WEBR, Channel 17, Manhattan, New York. At the time of acquisition, Congress was considering legislation to create a new

Class A LPTV service that would afford interference protection to qualified LPTV stations.⁷

The legislative history of CBPA explicitly refers to LPTV station WEBR and the issue of interference to public safety operations on adjacent-Channel 16 as set forth in the FCC's 1995 conditional waiver. Reference was made to the "No Interference Requirement" of the CBPA. The Conference Committee Chairman (Senator Hatch), the original sponsor of the bill (Senator Burns), and the Senator from New York (Senator Moynihan) agreed in conference committee that WEBR was not to be precluded from a Class A license by any provision in the CPBA requiring qualified LPTV stations not to cause "interference within the protected contour of 80 miles from the geographic center of the areas listed in section 22.625(b)(1) or 90.303 of the Commission's regulations (47 C.F.R. 22.625(b)(1) and 90.303) for frequencies in . . . the 482-488 megahertz band in New York."⁸

Ultimately, this clarification in the CPBA legislative history influenced the FCC to conclude that indeed WEBR was entitled to status as a qualified LPTV station and deserving of a Class A license. However, in the course of the rulemaking proceeding implementing CPBA, the Commission's staff "encouraged" KLI to address NYMAC's concerns about future interference to public safety agencies using Channel 16 in New York. Accordingly, KLI communicated with NYMAC's legal representative and a letter of understanding was signed by the parties and submitted to the FCC. A copy is attached hereto beneath Tab C.

At the time of the rulemaking, KLI had a pending minor modification application for DTV displacement relief on Channel 17, requesting an increase in the authorized power and a change in antenna pattern to ameliorate DTV interference. KLI agreed to coordinate the

⁷ See Community Broadcasters Protection Act of 1999 ("CBPA"), P.L. 106-113, 113 Stat. 1501A-594 (Nov. 29, 1999).

⁸ *Id.* at § 5008(f)(C)(ii).

implementation of these improvements to WEBR(CA), and to prevent interference to public safety agencies with the improved facilities, if the FCC granted KLI's DTV displacement relief application. KLI's DTV displacement relief application was denied by the FCC on August 19, 2002, and reconsideration is pending.

This letter agreement between KLI and NYMAC pertains only to KLI's DTV displacement application. It is not a bilateral coordination agreement. It does not address the future improvement or alteration of the public safety communications system operating on Channel 16 in New York. The Notice is incorrect in characterizing the agreement as a bilateral one "that coordinates interference between them."⁹

In mid-2002, representatives of the City of New York Police Department ("NYPD") contacted KLI and requested a meeting. That meeting took place at Police Headquarters, One Police Plaza, New York, New York, on August 23, 2002, and is summarized in correspondence dated August 28, 2002, between KLI's counsel and NYPD attached hereto beneath Tab D. Present at the meeting were Lt. Cornelius Walsh of NYPD; Mr. Emil Vogel, formerly of Motorola and currently the principal of Vogel Consulting Group; Julian Shepard, counsel to KLI; and Clarence Beverage, KLI's consulting engineer and a principal of Communications Technologies, Inc.

NYPD described its plans to seek permanent licensing of its public safety communications system, to expand the system on Channel 16, and to make use of frequencies closer to the Channel 16/17 band edge. NYPD requested certain technical information from KLI, which KLI subsequently provided. KLI requested certain technical information from NYPD and proposed to enter into a confidentiality/non-disclosure agreement to protect the

⁹ Notice at ¶ 9.

confidentiality of all information provided by NYPD to KLI, its counsel, and its consulting engineer. KLI outlined specific information it desired in the August 28, 2002 letter. KLI requested information about the current use of Channel 16 by NYPD, and detailed information about the proposed future use of Channel 16 by NYPD. In the course of discussions on August 23, 2002, KLI's counsel asked what was the estimated construction cost of the new, expanded Channel 16 public safety communications system. Mr. Vogel stated that it was approximately \$250 million.

On December 5, 2002, the NYPD filed an *ex parte* report with the Commission, subtitled *The Need to Allocate Channel 16 in the New York Metropolitan Area to the Land Mobile Service for Public Safety Communications on a Permanent Basis*. Though this report makes reference to WEBR(CA) more than thirty times, neither NYMAC nor NYPD provided a copy of this submission to KLI either before or after filing it with the FCC. By mid-January 2003, neither KLI nor its counsel had received any response to the August 28, 2002 letter, information request, or proposed confidentiality agreement.

KLI's counsel sent a follow-up letter to NYPD dated January 27, 2003, which is attached hereto beneath Tab E. That letter pointed out that KLI had provided NYPD with all of the technical information that NYPD had requested, but had not received any response by NYPD to its information request. The letter also stated that the FCC has long recognized that inter-service coordination requires the mutual exchange of technical information. Without such an information exchange, there can be no meaningful coordination.

NYPD responded to KLI with what can only be characterized as totally bad faith in a letter dated February 7, 2003, a copy of which is attached hereto beneath Tab F. Not only did NYPD fail to provide the information KLI requested, but NYPD failed to inform KLI of its

ex parte submission – the very document which has formed the basis of the Notice in this proceeding. NYPD withheld the fact that it had made a major FCC submission affecting KLI, completely refused to provide any of the information KLI had requested, and matter-of-factly ignored the draft confidentiality agreement KLI had provided.

II. The Notice Lacks Adequate Technical Information for an Independent Interference Analysis

The Commission must determine in this proceeding whether the proposed public safety operations will interfere with television operations on co- and adjacent channels, including reception of WEBR(CA) on Channel 17 in the New York Metropolitan area. 47 U.S.C. § 337(c)(1)(B). In addition, the Commission must establish service rules and impose whatever conditions are necessary to: (1) establish interference limits at the boundaries of the spectrum block and service area; and (2) establish any additional technical restrictions necessary to protect full-service analog television service and digital television service during a transition digital television service. 47 U.S.C. §337(d).¹⁰ The NYMAC submission provided in the Notice does not provide sufficient technical information for the Commission to satisfy its statutory obligations, or to permit independent analysis of the interference issues by the Commission, or by interested parties.

In order to participate meaningfully in this proceeding, KLI must understand the precise facilities and technical criteria that are proposed by NYMAC. KLI's consulting engineer cannot perform an independent interference analysis in the absence of such information. As set forth in the Engineering Statement attached hereto beneath Tab G, incorporated herein by

reference, “certain basic criteria must be specified for RF transmission and reception facilities, if one is to evaluate potential impact from Channel 16 land mobile operations to Channel 17 television reception and from Channel 17 television operation to Channel 16 land mobile operations.”¹¹ The Beverage Engineering Statement sets forth specific technical information, which is required for an independent interference analysis.¹²

The technical conclusions in the NYMAC report are suspect. For example, Vogel’s analysis concludes that police radio coverage is only 35 percent of what it could be with WEBR(CA) off the air at the study site location.¹³ However, the report previously notes that detailed measurements are required to confirm that 35 percent figure.¹⁴ Thus, what was made as a statement of fact in one part of the NYMAC report, is actually only a projection. In addition, the noise floor that NYMAC is seeking to establish as a standard is –123 dBm or 0.14 uv into a 50 ohm receiver. In reality, the urban environment of New York City makes this level of performance unattainable given existing interference sources. NYMAC’s analysis should be scrutinized utilizing accumulated measured signal level data for each channel proposed to establish a true and reasonable baseline interference level (noise floor). Also, the NYMAC report asserts the existence of interference to public safety communications from WEBR(CA). In fact, no public safety agency has complained formally or informally of interference from WEBR(CA). It should be added that WEBR(CA) operates with a band-pass filter on its

¹⁰ WEBR(CA) is entitled to consideration under Section 337(d)(2) as a “full service” analog television station in the aftermath of the Commission’s Class A rulemaking proceeding. WEBR(CA) has interference rights no less than those of other full-service television stations.

¹¹ Engineering Statement of Clarence M. Beverage for Communications Technologies, Inc. (“Beverage Engineering Statement”), p. 1.

¹² *Id.* at pp. 2-3.

¹³ NYMAC Report at p. 36

¹⁴ *Id.* at p. 35

transmitter output, which make the claims of out-of-band emissions and forecasts of such highly suspect.¹⁵

III. This Proceeding Should be Enlarged to Examine Spectrum Availability within the Existing Public Safety Spectrum Assignments in the New York Metropolitan Area

The Commission is under a statutory obligation to determine whether NYMAC's proposal meets the requirements for a Section 337 waiver.¹⁶ Section 337(c)(1)(A) requires a determination that "no other spectrum allocated to public safety service is immediately available to satisfy the requested public safety use." The intention of Congress is clear; public safety agencies are not entitled to the waiver procedure unless they have made efficient use of their current spectrum allocations. That is why that requirement is a part of the statute.

In the case of NYMAC, the New York public safety agencies must demonstrate that they have made adequate efforts to improve the spectrum efficiency of existing allocations. Otherwise, additional Channel 16 spectrum should not be reallocated to public safety use on a permanent basis by building upon a temporary conditional waiver that was granted seven years ago because more spectrum-efficient technology was then characterized as being in its infancy, or too expensive. Indeed, the projected cost of the Channel 16 build-out is close to the cost estimated in 1995 to implement more spectrum efficient technology in the then current public safety allocations used by public safety agencies in New York.¹⁷

The Commission should not be distracted from its long-standing policy of promoting spectrum-efficiency. At the very least, the issues in this proceeding should be

¹⁵ See description of band pass filter in the attachment to the letter beneath Tab F.

¹⁶ See discussion of Section 337(c) statutory requirements in Section IV of KLI's *Comments*.

enlarged to encompass pertinent questions of the efficiency of use of existing spectrum by the NYMAC agencies, and alternatives to expanded use of television Channel 16. In addition, the related issue of whether there is in fact a need for additional spectrum by New York public safety agencies should be examined. Pertinent questions in this regard were directed to NYMAC's representative in the August 28, 2002, letter from KLI's counsel to NYPD, incorporated herein by reference (attached beneath Tab D).

IV. NYMAC's Proposal Fails to Qualify for the Requisite Section 337(c) Waiver

The Notice implies that the unique situation of public safety communications services in New York City, a highly spectrum-congested area, justifies a departure from the waiver requirements of Section 337 for licensing of unused frequencies for public safety services. The Notice appears to propose the use of Section 303 spectrum-allocation authority to re-allocate and assign Channel 16 to public safety users instead of granting a waiver pursuant to Section 337(c).¹⁸ This approach is based upon an incorrect statutory analysis. In addition, the Notice incorrectly concludes that the proposed use of Channel 16 meets the requirements for a waiver set forth in Section 337(c).¹⁹

The Commission is bound to apply all of the requirements of Section 337 correctly, and not to rely on broad Section 303 authority to avoid – or to give superficial treatment to – such requirements in response to the NYMAC request. The legislative history indicates that Section 337 was intended to address public safety needs in the most spectrum-

¹⁷ The 1995 conditional waiver stated that the costs of implementing more spectrum efficient technology were approximately \$275 million. NYMAC representatives stated to KLI's counsel that the estimated cost of the Channel 16 build-out is approximately \$250 million.

¹⁸ Notice at ¶ 6.

¹⁹ Notice at ¶ 12.

congested situations such as these. Indeed, the 1995 conditional waiver for Channel 16 public safety use in New York City became Congress's model for what became Section 337(c). Congress liked the use of waivers and considered waivers the best solution for the future treatment of public safety spectrum requests in congested markets.²⁰ Indeed, the sponsor of the House Bill sharply criticized the Commission for commencing general reallocation proceedings to resolve the need for public safety broadcast spectrum, in lieu of the more expeditious approach taken with Channel 16 in New York City.²¹ Congress did not intend for the Commission to be in a position to pick and choose between case-by-case waivers and rulemaking proceedings; it intended quite the opposite – only case-by-case waivers under circumstances such as these.

In any event, the Notice's analysis of the Section 337(c) requirements is problematic and incorrect. First, for reasons set forth in the preceding sections of KLI's *Comments*, satisfaction of the requirements of Section 337(c)(1)(A) and (B) have yet to be established. The Notice fails to inquire about these issues; instead, NYMAC's unsupported conclusions are tentatively adopted.

Second, the plain language of Section 337(c)(1)(C) requires a showing that "the use of the unassigned frequency for the provision of public safety services is consistent with other allocations for the provision of such services in the geographic area for which the application is made." 47 U.S.C. § 337(c)(1)(C). The Notice takes note of the successful history

²⁰ See Statement of Rep. Harman, 143 Cong. Rec. E955 (daily ed. May 19, 1997).

²¹ Congress specifically took note of the Commission's February 9, 1995 report on "Meeting State and Local Agency Spectrum Needs Through the Year 2010" and its policy of handling critical public safety spectrum requirements on a case-by-case basis. Congress expressed a clear preference for case-by-case waivers to ensure even-handed treatment to all requests. In comments on the needs of Los Angeles, which were repeatedly discussed in the Legislative History, the House Bill sponsor commented, "if there was ever a circumstance warranting application of [the] Policy Statement's preference for case-by-case waivers, this is that circumstance." *Id.*

of inter-service sharing during the conditional waiver period.²² However, nothing in the Notice indicates that NYMAC's proposed use would be consistent with existing public safety allocations in the New York Metropolitan area, which are subject to frequency and distance separations to television assignments.²³ In fact, the essence of the NYMAC proposal is *expanded* use of Channel 16 with heretofore-unauthorized inter-service sharing criteria. Neither the Notice, nor NYMAC's submission, contains any promise of requirements that the expanded use of Channel 16 will occur only on the same terms and conditions as the 1995 conditional waiver, *i.e.*, the protection of all television station operations in the area. Therefore, the NYMAC proposal does not meet the requirements of Section 337(c)(1)(C).

Third, the plain language of Section 337(c)(1)(D) requires that "the unassigned frequency was allocated for its present use not less than 2 years prior to the date on which the application is granted." 47 U.S.C. § 337(c)(1)(D). The unassigned frequencies (those which are to be used under NYMAC's *expanded use* proposal) were in fact put in use by NYMAC agencies as a guard band between Channels 16/17 at the time of the conditional waiver. Those frequencies could not be used by NYMAC agencies in the New York Metropolitan area, or by any other user (including any licensed television station), without resulting (prohibited) interference. Therefore, the "*present use*" of the unassigned frequency was *never allocated for its present use*; the unassigned frequencies are a guard band, although never formally *allocated* as a guard band. For these reasons, the NYMAC proposal fails to meet the plain language requirements of Section 337(c).

²² Notice at ¶ 14.

²³ See Beverage Engineering Statement at p. 3.

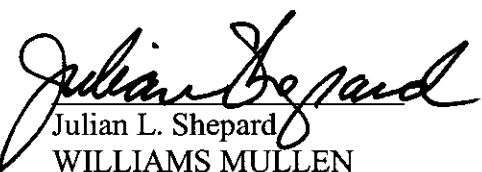
V. Conclusion

The Notice in this proceeding was sufficient to raise serious concerns about the potential for future interference to WEBR(CA), but insufficient to permit KLI's consulting engineer to evaluate the issue. Clearly, the Administrative Procedures Act requires the Commission to provide adequate notice to permit interested parties to participate meaningfully in the rulemaking process.

KLI respectfully requests that NYMAC be required to disclose the factual information necessary for KLI's consulting engineer to conduct an independent analysis of interference from the proposed expanded use of Channel 16 by the NYMAC agencies, and that dates for supplementary comments and reply comments be established by Public Notice.²⁴ In addition, KLI requests that the issues in this proceeding be enlarged as described above before final rules are adopted. Additional time for further comment on detailed technical disclosures from NYMAC and public comment on an expanded set of issues would be in the public interest.

Respectfully submitted,

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²⁴ KLI is amenable to receiving the necessary technical information from NYMAC or NYMAC agencies subject to an FCC protective order, if the FCC deems such an order to be necessary.